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No. 79-305

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 592 F.2d 848.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on April 5, 1979. A timely petition for rehearing was denied on June 27, 1979 (Pet. App. 11a-12a). Mr. Justice Powell extended the time for

filing a petition for a writ of certiorari to and including August 26, 1979 (Pet. App. 13a). The petition for a writ of certiorari was filed on August 24, 1979, and was granted on November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's false trial testimony, given in response to proper cross-examination, where the evidence does not squarely contradict the defendant's testimony on direct examination.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, respondent was convicted of possessing cocaine with intent to distribute it and of importing and conspiring to import cocaine, in violation of 21 U.S.C. 841(a)(1), 952(a), 960(a)(1), and 963. He was sentenced to

three concurrent eight-year terms of imprisonment, to be followed by a special parole term of three years, and to a fine of $5,000.

The evidence showed that on October 2, 1977, respondent and John Kenneth McLeroth, both attorneys from Fort Wayne, Indiana, arrived at the Miami Airport on a flight from Lima, Peru (A. 3-4, 10-11, 14-15, 30). McLeroth underwent a customs search, which revealed 13 bags containing more than three pounds of cocaine sewed into 12 makeshift pockets in a T-shirt under his clothing (A. 3-9). He advised customs officials that respondent was travelling with him, and he implicated respondent in the importation of the cocaine (A. 9-13, 29). DEA and customs agents then found respondent, who had already cleared customs approximately four hours earlier (A. 14). The agents retrieved respondent's luggage and searched it without a warrant (Pet. App. 2a). Inside the luggage, the agents found two medium-sized T-shirts. One of them had pieces cut out of it that corresponded to the pockets sewed into McLeroth's T-shirt (A. 36-38). After a hearing prior to trial, the court suppressed the two T-shirts found in respondent's luggage on the ground that the search of the luggage violated respondent's Fourth Amendment rights.[1]

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[1] The government did not appeal the suppression order because it was felt that there was sufficient evidence against respondent even without the suppressed evidence. Nor did the government suggest on defendant's appeal that the evidence was the product of a lawful border search, although

After pleading guilty, McLeroth testified for the government at respondent's trial. He discussed several trips that he and respondent had made to Peru.[2] He also testified that respondent had supplied him with the altered T-shirt (A. 21) and had sewed the pockets of the T-shirt closed to prevent the bags from falling out (A. 27-28).

Respondent testified in his own defense and denied any involvement in cocaine smuggling (A. 30-31, 33-34). His direct testimony then continued as follows (A. 34):

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we believe the search could have been upheld on that ground. See *United States* v. *Walters*, 591 F.2d 1195, 1197-1198 (5th Cir. 1979); *United States* v. *Wardlaw*, 576 F.2d 932, 935 (1st Cir. 1978). See also *United States* v. *Nieves*, No. 79-1051 (2d Cir. Oct. 30, 1979), slip op. 5325-5327, petition for cert. pending *sub nom. Figueroa* v. *United States*, No. 79-5702; *United States* v. *Golden*, 532 F.2d 1244 (9th Cir.), cert. denied, 429 U.S. 842 (1976); *United States* v. *Glaziou*, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969); *United States* v. *McGlone*, 394 F.2d 75, 78 (4th Cir. 1968). Since we did not argue in the court of appeals that the search was a permissible border inspection, we do not make that contention here.

[2] During the first trip, in April 1977, McLeroth had smuggled approximately four pounds of cocaine into the country in bags taped to his body by an elastic bandage, for which he received $15,000 from respondent (A. 17-20). In early June 1977, respondent made a second trip to Lima alone. Upon his return, respondent informed McLeroth that his connection in Lima "was very apprehensive and was not about to provide any further cocaine source at that time" (A. 20). The third trip, in early September 1977, was unsuccessful because the "source" in Lima had been arrested (A. 21-23). The fourth trip ended with respondent's arrest.

Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?

A. Yes, I did.

Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?

A. I did not.

* * * * *

Q. I will ask you whether or not you were arrested with cocaine on your body or luggage or anywhere else.

A. No, I was not.

On cross-examination, respondent testified as follows (A. 35):

Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?

A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

* * * * *

Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

A. Absolutely not.

Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977,

did you have in your suitcase Size 38-40 medium tee shirts? [3]

Defense counsel objected to this question (A. 36), but, after some discussion, the court overruled the objection and permitted the prosecutor to pursue that line of questioning, which continued as follows (A. 46):

> Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?
>
> A. Not to my knowledge.
>
> * * * * *
>
> Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for Identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?
>
> A. Not to my knowledge. No.

Respondent further denied having told a DEA agent that the T-shirts found in his suitcase belonged to McLeroth (A. 47-48).

On rebuttal the government called the agent, who testified that he had found T-shirts, including Government Exhibit 9, in respondent's suitcase and that respondent had stated at that time that they belonged to McLeroth (A. 50-52). The court instructed the jury that this evidence was to be considered only for the purpose of impeaching respondent's credibility (A. 44; Tr. 412-413).

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[3] Respondent had testified that he wears a size 44-46 T-shirt. (A. 35).

Relying primarily on *Agnello* v. *United States*, 269 U.S. 20 (1925), and *Walder* v. *United States*, 347 U.S. 62 (1954), the court of appeals reversed respondent's conviction. The court stated that those cases provide that illegally seized evidence may be used for impeachment only if the predicate for its use is found in the defendant's direct examination and only if the evidence contradicts a particular statement made by the defendant (Pet. App. 6a-7a). Applying these principles, the court held that since respondent was not asked and did not testify about the T-shirt or the contents of his luggage until cross-examination, this case "falls squarely within" this Court's decision in *Agnello*, and the evidence was not admissible even for the limited purpose of impeachment (Pet. App. 9a).

SUMMARY OF ARGUMENT

This case concerns the admissibility, for purposes of impeaching a defendant's testimony, of physical evidence seized in an illegal search. We contend that the court of appeals erred on two grounds in excluding the evidence. First, the court was incorrect in holding that illegally seized evidence may never be introduced to impeach false testimony given on cross-examination. Second, even if the court was correct in so holding, the court erred in ruling that respondent's direct testimony was not sufficiently in conflict with the suppressed evidence to authorize the use of that evidence for impeachment.

I.

A. This Court has never specifically considered the question whether illegally seized evidence is admissible to impeach testimony given in response to cross-examination properly within the scope of the defendant's direct examination. In *Agnello* v. *United States*, *supra*, the Court held that certain illegally seized evidence could not be admitted to impeach the defendant's denial on cross-examination that he had ever seen that evidence. The Court relied on the proposition that illegally seized evidence "shall not be used at all" and noted that the defendant had said nothing on his direct examination to justify cross-examination with respect to the illegally seized evidence. The Court has since rejected the principal premise of *Agnello* and has permitted illegally obtained evidence to be used in a number of contexts, including for impeachment of a defendant's false testimony in *Walder* v. *United States*, *supra*, *Harris* v. *New York*, 401 U.S. 222 (1971), and *Oregon* v. *Hass*, 420 U.S. 714 (1975). Weighing the costs to the integrity of the trial process against the deterrence policy of the exclusionary rule, the Court has found that the use of the evidence for impeachment must be permitted and that the deterrence policy of the exclusionary rule is satisfied by excluding the evidence from the prosecution's case in chief. *Harris*, *supra*, 401 U.S. at 225. Because those cases permitting the use of the evidence involved impeachment of direct testimony, and even *Agnello*, whose rationale has since been abandoned, involved cross-examination

found to have exceeded the scope of direct testimony, the Court has never specifically decided the propriety of the use of illegally seized evidence for impeachment purposes when the false testimony is given in response to proper cross-examination questions.

B. The distinction between direct examination and cross-examination upon which the court of appeals' ruling is predicated cannot be sustained. The two aspects of a witness's testimony are interwoven parts of an indivisible legal whole. A rule that countenances false testimony on cross-examination has the same pernicious consequences for the integrity of the trial process as one that allows false direct testimony to go unchallenged. The witness who takes the stand to tell his story must answer all pertinent questions about it, *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958), and so long as the prosecutor does not exceed the liberal limits established for cross-examination of the defendant's direct testimony, he cannot properly be accused of "smuggling in" impermissible material even if he asks questions that, if truthfully answered, would disclose information also evidenced by illegally seized items. In our adversary system, cross-examination is the primary means of testing the veracity of the story told by a witness on his direct examination and clarifying ambiguities or filling gaps in the direct testimony, and cross-examination cannot be effective, as a practical matter, if the witness is free to answer questions falsely without fear of impeachment. See *Davis* v. *Alaska*, 415 U.S. 308, 314-318 (1974).

The effect of the exclusion of highly probative evidence from impeachment of any testimony, cross as well as direct, can only be to encourage defendants to present false defenses, giving them the "license to commit perjury" (*Glickstein* v. *United States*, 222 U.S. 139, 142 (1911)) that this Court has often counseled against. Moreover, permitting impeachment does not impermissibly infringe on the defendant's right to testify in his own behalf, because his decision to take the stand carries with it the obligation to testify truthfully and to respond to proper cross-examination. See *United States* v. *Grayson*, 438 U.S. 41 (1978).

C. In considering the proper application of the exclusionary rule, the costs of exclusion must be weighed against the potential benefits that may be expected in terms of deterrence of illegal police conduct. It is evident, we believe, that the costs of the rule adopted by the court of appeals far outweigh any incremental deterrence benefits that could possibly be gained. The unavailability of illegally seized evidence for use in the prosecution's case in chief completely destroys the possibility of a successful prosecution in many cases, which can reasonably be expected to serve as a material deterrent to official misconduct. If the Court adopts the rule for which we contend, suppressed evidence will remain inadmissible unless several conditions coincide—the defendant chooses to testify, the nature of his testimony is such that proper cross-examination can explore subject matter to which the illegally seized evidence relates, and his testimony on cross-examination is

false. This Court has characterized as "speculative" (*Harris*, *supra*, 401 U.S. at 225; *Oregon* v. *Hass*, *supra*, 420 U.S. at 723) the prediction that the potential availability of illegally seized evidence for impeachment purposes would significantly encourage police misconduct. Any incremental deterrence that might result from limiting impeachment to false testimony on direct examination is even more speculative and can only be deemed insignificant. It should not outweigh the policy of discouraging false testimony at trial.

Accordingly, we submit that illegally seized evidence must be admissible to impeach false testimony given in response to cross-examination questions properly within the scope of a defendant's direct testimony. The Court's decision in *Agnello* is not inconsistent with this position because of the Court's finding there that the cross-examination was improper; but to the extent *Agnello* is read to be inconsistent with our position, it should be overruled.

II.

Assuming that the court of appeals correctly held that illegally seized evidence may be used for impeachment only of testimony given on direct examination, the court erred in holding that respondent's direct testimony was not impeachable. While that testimony did avoid specific reference to the suppressed evidence, respondent's general reference to lack of involvement in "that kind of activity" was calculated to suggest to the jury a denial of Mc-

Leroth's testimony that respondent assisted in concealing the cocaine for smuggling. This denial was impeachable by the suppressed evidence. The Fifth Circuit's requirement that a particular statement of the defendant on direct examination be directly contradicted by the evidence establishes a more restrictive standard for admissibility than heretofore suggested by any other court of appeals. If this standard is adopted, the threat of impeachment that ordinarily should deter defendants from giving perjured testimony will be of no practical significance in a case like this, because defendants will be able to tailor their direct testimony to avoid impeachment while still effectively denying the inferences to be drawn from the suppressed evidence.

ARGUMENT

The court of appeals held that the trial court erred in admitting the suppressed evidence of the T-shirts for impeachment purposes, ruling that *Agnello* v. *United States*, *supra*, and *Walder* v. *United States*, *supra*, establish two requirements for the use of illegally seized evidence for impeachment purposes. First, the predicate for its use must be found in the direct examination of the defendant. Second, the impeachment evidence must contradict a particular statement made by the defendant (Pet. App. 6a-7a). We contend that the court erred on both counts. In Part I, *infra*, we argue that the policies of the exclusionary rule and the decisions of this Court do not support the existence of a distinction in the use of

illegally seized evidence between impeachment of a defendant's false testimony on direct examination and impeachment of a defendant's false testimony on proper cross-examination. In Part II, *infra*, we contend that, even if such a distinction between direct and cross-examination testimony is sound, the court of appeals erroneously restricted the scope of this Court's decisions in *Walder* and *Harris* v. *New York*, *supra*, in holding that the suppressed evidence in this case did not sufficiently contradict the direct testimony of the defendant to justify its use for impeachment purposes.

I. ILLEGALLY SEIZED EVIDENCE MAY BE ADMITTED FOR THE PURPOSE OF IMPEACHING FALSE TESTIMONY GIVEN BY A DEFENDANT IN RESPONSE TO PROPER CROSS-EXAMINATION QUESTIONS

A. The Decisions Of This Court Do Not Establish A Distinction Between Impeachment Of Direct Testimony And Impeachment Of Cross-Examination Testimony

This Court first considered the question of the admissibility of illegally seized evidence in response to the testimony of a defendant in *Agnello* v. *United States*, 269 U.S. 20 (1925). In that case, the defendant was indicted for conspiracy to sell a package of cocaine. On direct examination, he admitted receiving the packages in question, but testified that he did not know what was in the packages and would not have carried them if he had known that they contained cocaine. On cross-examination, the defendant

denied ever having seen narcotics before. At that point, the defendant was asked if he had ever seen a particular can of cocaine before; the can had been seized earlier from the defendant's bedroom pursuant to an illegal search. When the defendant denied ever having seen the can of cocaine, the trial court permitted the government to introduce it into evidence in rebuttal. 269 U.S. at 29-30. This Court held that the evidence was improperly admitted, citing *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), for the proposition that illegally seized evidence "shall not be used at all." The Court also noted that the defendant had not testified concerning the can of cocaine on his direct examination and had done nothing "to justify cross-examination in respect of the [illegally seized] evidence." 269 U.S. at 35.

This Court first limited the implications of *Agnello* in *Walder* v. *United States*, 347 U.S. 62 (1954). In 1950, a heroin capsule was found in the defendant's possession during an illegal search. When a motion to suppress the heroin was granted, the case against the defendant for possession of narcotics was dismissed. In 1952, the defendant was indicted on new charges based on eyewitness testimony that he engaged in narcotics transactions. On direct examination, the defendant testified that he had never possessed narcotics. The Court held that the trial court properly admitted for impeachment purposes the evidence of the heroin capsule illegally seized two years earlier. The Court stated (347 U.S. at 65):

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Thus, at a minimum, the Court rejected the statement in *Agnello* that tainted evidence could not be used for impeachment purposes at all. The Court distinguished *Agnello*, however, on the basis that the government there sought to "smuggle in" the tainted evidence on cross-examination, quoting the Court's finding in *Agnello* that the defendant did nothing to justify the cross-examination that led to the false testimony. 347 U.S. at 66.

In *Harris* v. *New York*, 401 U.S. 222 (1971), the Court once again considered the use of illegally procured evidence to impeach a defendant's testimony at trial. The defendant was charged with making two sales of heroin to an undercover agent. On his direct testimony, the defendant denied making one of the sales and claimed that the second sale was of baking powder, not heroin. On cross-examination, he was asked about statements that he had made to the police after his arrest that were inconsistent with his trial testimony. These statements were not admissible in the prosecution's case in chief because they had been made without the benefit of proper *Miranda* warn-

ings. The trial judge instructed the jury that the statements attributed to the defendant by the prosecution were admissible for impeachment purposes only, not as evidence of guilt.

This Court agreed that the statements were properly admitted. It specifically rejected the notion that the use of suppressed evidence for impeachment that was approved in *Walder* was limited to testimony on collateral matters.[4] The Court focused on the importance of impeachment to the truth-finding objective of the trial and noted that the defendant's right to testify did not give him the right to commit perjury. The Court explained (401 U.S. at 225; footnote omitted):

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

The policies of the exclusionary rule did not, in the Court's view, require that the prosecution be denied the right to impeach and forced to allow the defendant's perjury to go unchallenged. The Court found that there was only a "speculative possibility" that its decision would encourage impermissible police conduct and ruled that "sufficient deterrence [of unlawful police conduct] flows when the evidence in

[4] The Court made no distinction between the statements introduced in *Harris* and the physical evidence introduced in *Walder*.

question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225.

Clearly, the approach taken in *Harris* is completely at odds with the rationale of *Agnello*. *Agnello* did not consider the serious impact upon the truth-seeking function of a trial that is engendered by denying the ability to impeach perjured testimony; it relied simply on the absolutist view that illegally seized evidence can never be used at trial. *Harris*, on the other hand, weighed the benefits of the policies of discouraging perjury and eliciting the truth at trial against the deterrence effect that could result from excluding the evidence and concluded that the interests in question were best balanced by admitting the evidence.

The Court again applied the *Harris* analysis in *Oregon* v. *Hass*, 420 U.S. 714 (1975). There, police arrested the defendant on suspicion of bicycle theft. While in a patrol car en route to the site where one of the bicycles was hidden, the defendant stated that he wanted to speak to his attorney. Certain statements and identifications obtained subsequent to that time but before the defendant was given an opportunity to speak to his attorney were suppressed on the authority of *Miranda*. When the defendant testified in his defense and denied pointing out to police two residences from which the bicycles were stolen, the prosecution was permitted to introduce for impeachment purposes the defendant's inconsistent statements made at the time of his arrest. The Court again upheld the use of the evidence for impeach-

ment, stating: "inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence." 420 U.S. at 723. It reiterated the position that the exclusionary rule does not prevent admission of the evidence because "there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief." 420 U.S. at 722.

Despite the strong policy favoring impeachment of perjured testimony enunciated in *Harris* and *Hass*, the court of appeals here held that the suppressed evidence was inadmissible to impeach false testimony given in response to cross-examination. Its view is in accord with the rule applied by other courts of appeals, which have similarly distinguished between direct and cross-examination. See *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979); *United States* v. *Whitson*, 587 F.2d 948 (9th Cir. 1978); *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976). However, the lower courts generally have not made this distinction through a reasoned application of the considerations applied in *Harris*,[5] but have done so as a means of reconciling the holdings of *Harris* and *Agnello*.[6]

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[5] Indeed, the court of appeals in this case made no reference at all to the policies of ascertaining the truth at trial and discouraging perjury.

[6] The First Circuit has reached this result reluctantly, questioning the logic of such a distinction as "artificial" for "allowing a defendant to lie safely on cross-examination but not on direct." *United States* v. *Hickey*, *supra*, 596 F. 2d at 1088. See also *United States* v. *Whitson*, *supra*, 587 F. 2d at 953 (Kilkenny, J., concurring and dissenting):

> It is wholly illogical to hold that a defendant may not hide beyond the shield of the *Miranda* rule if he perjures himself on direct examination, but may invoke the protection of *Miranda* if he perjures himself on the same subject matter on cross-examination.

This method of reconciliation derives from the Court's statement in *Walder* distinguishing *Agnello* on the ground that the prosecution there sought to "smuggle in" tained evidence on cross-examination. This Court has never stated, however, that the use of suppressed evidence for impeachment does not apply to impeachment of cross-examination testimony, and *Walder* need not be read to endorse such a sweeping proposition. The statement in *Walder* simply refers to the Court's finding in *Agnello* that the cross-examination questions that elicited the false testimony were outside the scope of the direct testimony. A prosecutor who properly limits his cross-examination to the scope of the defendant's direct testimony cannot validly be accused of trying to "smuggle in" impermissible material on cross-examination. The attempt to read *Walder* more broadly to establish a general rule prohibiting the impeachment of any cross-examination testimony with illegally seized evidence is clearly inconsistent with the subsequent statements in *Harris* and *Hass* that the purposes of the exclusionary rule are adequately served by denying the prosecution the right to use illegally seized evidence in its case in chief.

The actual holdings of *Agnello* and *Harris* can, it is true, be reconciled by drawing the distinction be-

tween direct and cross-examination that the court of appeals drew in the instant case. By the same token, they can also be reconciled by limiting the prohibition of *Agnello* to cases in which the cross-examination is beyond the scope of the direct examination or in which the cross-examination question involved was suggested solely by the tainted evidence.[7] Attempting to reconcile the holdings of *Agnello* and *Harris*, however, when their underlying rationales are fundamentally inconsistent, simply begs the question. The fact is that the Court has not yet squarely faced the question whether impeachment of false testimony with illegally seized evidence should be barred when the perjury occurs in response to proper cross-examination. This question should, we submit, be decided by applying the modern analysis set out in *Harris* and *Hass*—examining both the impact on the truth-finding function of the trial and the policy reasons for applying the exclusionary rule in such

[7] It may well be that the Court in *Agnello* relied on this last ground, that the cross-examination question was a "fruit" of the illegal seizure, in forbidding the introduction of the tainted evidence. The citation of *Silverthorne Lumber Co.* v. *United States, supra,* relates most closely to this theory. In *Silverthorne,* the government returned records that had been illegally seized but sought to use information that it acquired from reading the records while they were in its possession. Similarly, the Court in *Agnello,* in noting that the cross-examination questions were not suggested by the direct testimony, seems to be implying that the questions were suggested solely by the knowledge of the illegally seized evidence and thus that asking the questions was a means of using the suppressed evidence. Here, the line of questioning was not itself a "fruit" of the illegal seizure, but rather had an independent untainted source. See note 15, *infra.*

a situation—rather than the long-discarded principle of *Agnello* that all use of illegally seized evidence in judicial proceedings is absolutely barred.

B. The Rule Adopted By The Court Of Appeals Undermines The Integrity Of The Judicial Process By Permitting Perjury To Go Unchallenged

The fundamental goal of a trial in our legal system is the ascertainment of the truth, as long as the process complies with constitutional safeguards. See *Oregon* v. *Hass, supra,* 420 U.S. at 722. It is critical to the achievement of this goal and to the integrity of the judicial process that witnesses tell the truth when they are called to testify. The decision of the court of appeals, in permitting perjured testimony to go unchallenged, is at odds with the strong policy of discouraging perjury that this Court has found necessary to safeguard that judicial integrity.

In holding that a defendant can be prosecuted for perjury even if his allegedly false grand jury testimony was procured without *Miranda* warnings, the Court has stated that "[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." *United States* v. *Mandujano,* 425 U.S. 564, 576 (1976) (plurality opinion). See also *United States* v. *Wong,* 431 U.S. 174 (1977). Indeed, the policy against false testimony is so strong that the fact that a person was unconstitutionally compelled to respond to certain questions is not a defense to a prosecution for making false statements in violation

of 18 U.S.C. 1001. When a person is unlawfully required to answer questions, his proper remedy is to challenge the lawfulness of the requirement, but he may not "with impunity knowingly and willfully answer with a falsehood." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). See also *United States* v. *Knox*, 396 U.S. 77 (1969). Certainly, when the defendant voluntarily takes the stand and is asked proper questions that do not violate his constitutional rights, he is "under an obligation to speak truthfully and accurately." *Harris*, *supra*, 401 U.S. at 225.

This Court recognized in *Harris* that a rule insulating the defendant from impeachment of his false testimony by illegally seized evidence perverts the shield of the exclusionary rule into a "license to use perjury." 401 U.S. at 226. Yet the court of appeals has held that such impeachment is permissible only when the false testimony occurs on direct examination. This distinction between direct examination and cross-examination is an artificial one that provides no basis for applying different standards for impeachment of perjured testimony. False testimony on cross-examination is no less insidious than false testimony on direct examination.

When a witness takes the stand, cross-examination is the primary device for testing the veracity of his testimony and ensuring that the testimony does not contain strategic omissions. See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974); *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973); *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966). Indeed, cross-examination is

so critical to the judicial process that its availability to defendants is one of the fundamental rights that is protected by the Sixth Amendment. See *Pointer* v. *Texas*, 380 U.S. 400 (1965). In any realistic sense, cross-examination is part and parcel of the witness's testimony and cannot logically be separated from his direct testimony. Thus, once a defendant takes the stand, he cannot assert his Fifth Amendment privilege against legitimate cross-examination questions. *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958).

The decision of the court of appeals in this case severely restricts the ability of the prosecution to conduct effective cross-examination and thereby require the defendant to tell the whole story, not just those portions that he wishes to tell.[8] The court's decision does not specifically forbid the government from asking certain cross-examination questions,[9] but it does prevent the government from using evidence in its possession to impeach false answers to its questions. The right to impeach a witness is as important a part of the right to cross-examine as

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[8] As a general rule, the need for searching cross-examination to ensure that the truth is brought out is strongest when the defendant is on the stand, because he generally has the most to gain and least to lose from testifying falsely. See *Doyle* v. *Ohio*, 426 U.S. 610, 629 n.8 (1976) (Stevens, J., dissenting).

[9] Such a prohibition has been suggested by one court of appeals. The Ninth Circuit has stated that a trial court should not permit a question on cross-examination if the only evidence that can support the inquiry is inadmissible. *United States* v. *Whitson*, *supra*, 587 F. 2d at 952-953 n.6.

the right to delve into his story. See *Davis* v. *Alaska*, *supra*, 415 U.S. at 316. Manifestly, the ability to ask a question when the witness's false answer to that question cannot be impeached simply does not constitute effective cross-examination. *Id.* at 318. In accordance with these principles, the Court has held that it was proper for a district court to preclude a defense investigator from taking the stand unless he made his report available to the prosecution for possible use in impeaching his credibility. *United States* v. *Nobles*, 422 U.S. 225 (1975). The Court stated (422 U.S. at 241):

> The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth. * * * [I]t was within the court's discretion to assure that the jury would hear the full testimony of the investigator rather than a truncated portion favorable to [the defendant].

The practical impact of the court of appeals' decision on the government's ability to cross-examine and establish whether the defendant's direct testimony is the whole story or a half-truth is illustrated by the facts of this case. Here, McLeroth, the government's witness, testified that respondent assisted him in wrapping bags of cocaine around him with bandages and in preparing a T-shirt for smuggling cocaine. Respondent testified on his direct examination that he had nothing to do with the draping of

material around McLeroth's body or "that kind of activity" on the fourth trip to Peru (A. 34). This statement could easily have been interpreted by the jury as a denial of McLeroth's testimony that respondent was involved in preparing the T-shirt. Since an important function of cross-examination is to require a witness to clarify vague assertions and make them specific, a proper and obvious line of cross-examination was to ask respondent specifically about his role in preparing the T-shirt. Similarly, respondent asserted on his direct examination that no cocaine was found in his luggage (A. 34). It was logical to ask him on cross-examination whether any evidence of the crime other than cocaine was found in his luggage. Yet the rule propounded by the court of appeals prevents either of these lines of cross-examination from being pursued effectively because the respondent, himself an attorney, could and did feel free to lie and to tailor misleading testimony in reliance on the assumption that evidence of his mendacity could not be introduced. Compare *Davis* v. *Alaska*, *supra*, 415 U.S. at 314-318.

Moreover, the rule for which we contend—permitting unlawfully seized evidence to be introduced to impeach false answers given in response to proper cross-examination questions—would not impermissibly burden the defendant's right to testify in his own behalf. In deciding whether to take the stand, a defendant must consider the possibility that he will be impeached by evidence of prior convictions, *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967), and that

his direct testimony may be impeached by use of illegally seized evidence under *Harris*. The additional possibility that testimony on cross-examination may be impeached by use of illegally seized evidence is a consequence of the fact that he is obligated to respond to proper cross-examination questions even though that may prove damaging to his defense. See *Brown* v. *United States*, *supra*. Still, it is not considered unfair that the defendant be forced to consider the risks of cross-examination before deciding to take the stand. *McGautha* v. *California*, 402 U.S. 183, 215 (1971).

Thus, the appropriateness of the requirement that the defendant face the risks of impeachment with illegally seized evidence does not depend upon whether that impeachment is limited to false testimony on direct examination. Even if false answers on cross-examination may be impeached, it is clear that the burden of decision placed upon the defendant is no greater than that under *McGautha*, *Spencer* and *Harris*. When a defendant elects to tell his side of the story, his Sixth Amendment right to present a defense does not entitle him to avoid having the whole story told. See *United States* v. *Nobles*, *supra*, 422 U.S. at 241.

Moreover, the possibility of impeachment with tainted evidence arises only if the defendant gives false or misleading testimony. It is clear that the right of a defendant to testify in his own behalf does not include the right to commit perjury. Thus, even assuming that the possibility of impeachment has a

"chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible." *United States* v. *Grayson*, 438 U.S. 41, 54 (1978).[10]

In sum, we submit that a rule excluding illegally seized evidence from use for impeachment purposes whenever the false testimony sought to be impeached was given in response to cross-examination seriously impinges on the integrity of the judicial process. In our adversary system, direct and cross-examination are inextricably intertwined components of an integrated whole. In making an artificial distinction between direct examination and cross-examination, the court of appeals' rule inhibits the ability of the prosecution to cross-examine the defendant effectively and permits false testimony to stand unchallenged despite its inconsistency with probative and trustworthy evidence.[11] *Harris* has indicated that these considerations

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[10] In *Grayson*, the Court considered whether a judge could take into account in sentencing the fact that the defendant presented a false defense. The Court held that consideration of such a factor did not impermissibly chill a defendant's right to testify because there was no right to commit perjury. This case presents even less of a problem of possible "chilling" of a defendant's rights than did *Grayson*. In *Grayson*, it is conceivable that a defendant who was planning to testify truthfully would be afraid to take the stand because of the possibility that the judge would mistakenly believe that he was presenting a false defense. In this case, there is no possibility of introduction of the impeaching evidence unless the defendant actually testifies to matters that are contradicted by that evidence.

[11] Illegally seized physical evidence is no less trustworthy than legally seized evidence. The evidence involved in this case is even more trustworthy than the evidence admitted in

militate in favor of the admissibility of such evidence for impeachment purposes. Accordingly, the decision of the court of appeals rejecting the admissibility of the evidence can be supported, if at all, only on the basis that overriding policies of the exclusionary rule require suppression when the testimony is given on cross-examination. We now turn to consideration of the extent to which the court of appeals' decision would serve the policies of the exclusionary rule.

C. The General Purposes And Policies Of The Exclusionary Rule Do Not Require The Exclusion For Impeachment Purposes Of Evidence That Contradicts False Testimony Given In Response To Cross-Examination

The determination of truth at trial is the fundamental objective of our legal system, but it is not the only one. Exceptions must sometimes be made from the goal of pursuing the truth in order to give effect to other values deemed even more important. A prominent example of such an exception is the exclusionary rule, which prohibits the use of probative evidence that would otherwise aid in the truth-finding process because the evidence was obtained unlawfully. Because of its adverse impact on the ascertainment of truth, the rule has been described as "a needed, but grudgingly taken, medicament; no more should be

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Harris, since statements obtained without *Miranda* warnings may be untrustworthy to some degree, depending on the circumstances. *United States* v. *Whitson*, *supra*, 587 F. 2d at 951 n.5; see *Miranda* v. *Arizona*, 384 U.S. 436, 470 (1966).

swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964). Accordingly, the Court has established that "the application of the rule [is] restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

The Court has made it clear that the principal purpose of the exclusionary rule, at least in the context of violations of the Fourth Amendment, is to deter official misconduct. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *United States* v. *Calandra*, *supra*, 414 U.S. at 347. The rule is not designed to remedy the particular violation of the defendant's rights that triggers its application or to make him whole for the improper breach of his privacy. *Stone* v. *Powell*, *supra*, 428 U.S. at 486; *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). At times, the Court has also justified the rule on the basis of principles of "judicial integrity." See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 12-13 (1968). The Court has explained, however, that in the Fourth Amendment area, where the trustworthiness of the evidence is not in question, the policy of judicial integrity "has limited force" (*Stone* v. *Powell*, *supra*, 428 U.S. at 485), amounting in essence to the goal that the court not unduly encourage violations of Fourth Amendment rights by their rulings. Accordingly, the inquiry is "essentially

the same as the inquiry into whether exclusion would serve a deterrent purpose." *United States* v. *Janis*, 428 U.S. 433, 459 n.35 (1976). See also *United States* v. *Peltier*, *supra*, 422 U.S. at 536-539.

Utilizing this analysis, the Court has declined to apply the exclusionary rule in a variety of contexts in which the deterrent effect of exclusion on police conduct is judged unlikely to outweigh the cost to society that would result from excluding the evidence. For example, in *United States* v. *Calandra*, *supra*, the Court declined to prohibit the government from asking a grand jury witness questions based on information obtained in an illegal search. The Court observed that such an "extension of the exclusionary rule would seriously impede the grand jury" and stated that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." 414 U.S. at 349, 351. Likewise, in *United States* v. *Janis*, *supra*, the Court held the exclusionary rule inapplicable to bar evidence illegally seized by a state officer from admission in a federal civil tax proceeding, reasoning that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation." 428 U.S. at 453-454. And in *United States* v. *Ceccolini*, 435 U.S. 268 (1978), the Court held that the exclusionary rule should often be relaxed in the context of the testimony of a live witness who was identified as being in possession of relevant information as a result of an illegal search. The Court reasoned that applying the exclusionary rule to disqualify a knowledgeable witness from testifying at trial would impose " 'serious obstructions to the ascertainment of truth,' " while applying the rule in the context of that case "could not have the slightest deterrent effect on the behavior" of police officers. 435 U.S. at 277, 280.

In each of the foregoing cases, the Court recognized the dispositive factor to be the degree of additional deterrence that suppression could be expected to provide in the particular circumstances.[12] In each case, the Court concluded that, in view of the fact that the exclusionary rule already required suppression for some important prosecutorial needs, suppression in the circumstances presented, on the basis of the same police conduct, would not provide sufficient additional deterrence to outweigh the substantial societal costs of exclusion.

Those principles are equally applicable to this case. The question here is whether the application of the exclusionary rule to prevent impeachment of cross-examination testimony will provide sufficient addi-

[12] A similar analysis underlies decisions barring invocation of the exclusionary rule in federal collateral attacks on state convictions (*Stone* v. *Powell*, *supra*), declining to apply the exclusionary rule retroactively (see, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969)), and denying "standing" to persons whose own Fourth Amendment rights are not violated by an unconstitutional search (see, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978); *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969)).

tional deterrence of police misconduct to outweigh the harm in allowing false testimony to go unchallenged. We believe it is entirely implausible to suppose that the rule for which we contend would, to any material extent, encourage law enforcement officers to conduct illegal searches or seizures.

The paramount disincentive to such action is the expectation that, by operation of the exclusionary rule, illegally obtained evidence will be excluded from the prosecution's case in chief. In many cases, this exclusion would destroy the prosecution's case at the outset, because without the suppressed evidence the prosecution would not have sufficient evidence to get to the jury.[13] Even if the prosecution did have sufficient evidence to go to trial, several circumstances would have to coincide at trial in order for the rule we propose to be implicated. If the defendant elects not to testify or if he testifies truthfully, as he is obligated to do, the evidence could not be introduced for impeachment. If the defendant's direct testimony is limited to topics that do not justify cross-examination relating to the suppressed evidence, the evidence could not be introduced. Finally, if the defendant's direct testimony itself were in conflict with

[13] This was the case, for example, with the illegally seized evidence that was ultimately introduced for impeachment purposes in *Walder*. The prosecution in connection with which the evidence had been seized was dropped, apparently for lack of evidence, shortly after the evidence was suppressed. 347 U.S. at 63. The question of admitting the evidence for impeachment arose only when the defendant was charged two years later with a different offense.

inferences to be drawn from the suppressed evidence, the evidence could be introduced for impeachment under *Harris* and *Walder*, regardless of the disposition of the instant case.

It is highly speculative, to say the least, to suppose that an officer who would otherwise be deterred by the prospect of exclusion from the prosecution's case in chief would nevertheless be moved to make an illegal search for evidence by the possible availability of such evidence to impeach testimony given by the defendant on cross-examination. Indeed, if some overzealous officer did contemplate the practical consequences of his actions, he would undoubtedly conclude that the disadvantage of making certain evidence unavailable for the prosecution's case in chief far outweighed any "speculative possibility" (see *Oregon* v. *Hass*, *supra*, 420 U.S. at 723) that the evidence could be used for impeachment if the defendant were to testify falsely on cross-examination.[14]

[14] In this case, of course, there is no suggestion that the officers' conduct involved a deliberate or calculated Fourth Amendment violation. The agents searched respondent's luggage within a few hours after he entered the country and before he left the airport. While we do not contend here that the officers' action was lawful, we believe that it could be justified as a proper border search and that it was not unreasonable for the officers to believe that they were acting lawfully. See note 1, *supra*. When police officers act in good faith, application of the exclusionary rule generally serves little purpose and may be viewed by society as disproportionate to the wrong. See, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

Clearly, the exclusion of illegally seized evidence from use at trial in impeaching false testimony cannot be justified on the basis of its possible effect in deterring Fourth Amendment violations. The Court, of course, has already recognized this fact in finding in *Harris* and *Hass* that the "speculative possibility" of deterrence did not justify exclusion. Although both of those cases dealt with situations where the false testimony was given on direct examination, any incremental deterrence that would result from a rule forbidding the impeachment of false testimony on cross-examination would be insignificant, and cannot outweigh the interests of exposing false testimony by the defendant. The deterrence policy behind the exclusionary rule simply does not support a distinction in its application between false testimony on direct examination and on cross-examination. Indeed, *Harris* and *Hass* have already suggested how the balance between deterrence of Fourth Amendment violations and truth-seeking should be struck. "[S]ufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Harris, supra*, 401 U.S. at 225; *Hass, supra*, 420 U.S. at 722.

This statement from *Harris* plainly reflects the Court's conclusion that, with few exceptions, illegal searches and seizures that are deterrable at all by the prospect of evidentiary exclusion will be successfully deterred by the knowledge that the prosecution will have to make out a prima facie case without resort to illegally seized evidence. We believe that

this conclusion is sound. Few indeed will be the occasions on which police officers are both so sophisticated and so calculating that they will undertake an illegal search because of possible trial uses of evidence other than in the prosecution's direct case. The implication of this principle is that, if the prosecution survives a motion for judgment of acquittal at the close of its case, and the defense then elects to adduce testimony that is belied by the illegally seized evidence, such evidence should become admissible on rebuttal for all purposes, not just for impeachment.

While we believe that is a proper result, the Court need not go so far in deciding the present case. Here, the evidence was admitted only for the limited purpose of impeaching respondent's credibility, not as substantive evidence. Moreover, here the deterrence benefits of exclusion, such as they may be, must be weighed against particularly strong interests in safeguarding meaningful cross-examination and protecting the integrity of the judicial process against the taint of false testimony. Were this Court to sustain the distinction between direct and cross-examination drawn by the court of appeals, defendants would be relatively free on direct examination to testify falsely and to convey misleading impressions about their actions and intentions—provided they took care to tailor their testimony to avoid statements squarely contradicted by the illegally seized evidence—without fear of effective challenge on cross-examination. This constitutes a use of the exclusionary rule as an instrument to thwart the "traditional truth-testing de-

vices of the adversary process," *Harris*, *supra*, 401 U.S. at 225, and can only encourage the commission of perjury.

We submit that the defendant should not be permitted to turn the exclusionary rule to his benefit in this manner. When he takes the stand, the defendant is obligated to respond to proper cross-examination questions, *McGautha* v. *California*, *supra*, and he is obligated to testify truthfully, *United States* v. *Grayson*, *supra*. If he chooses to commit perjury, the Fourth Amendment cannot protect him against impeachment of his credibility. Accordingly, false testimony given in response to proper cross-examination questions within the scope of the direct testimony must not be permitted to stand without impeachment, even if the impeaching evidence was illegally seized.[15]

In our view, this position is consistent with the holding of *Agnello*, which rejected impeachment by

[15] In this case, the line of cross-examination of respondent concerning the T-shirt was suggested by McLeroth's testimony that respondent assisted him in preparing the T-shirt. Although not presented here, a situation could arise in which the line of cross-examination that results in the false testimony was suggested only by the tainted evidence, *i.e.*, the cross-examination is a "fruit" of the illegal seizure. In that situation, the need for admission of the evidence is arguably not as strong as it is here, because exclusion would not effectively foreclose the prosecution from pursuing legitimate lines of cross-examination that would have been pursued even without the illegal seizure. The Court in *Agnello* appears to have relied heavily, if not exclusively, on this factor of the impropriety of the cross-examination, either because it exceeded the scope of the direct examination or because it was a

tainted evidence in a case in which the cross-examination was deemed to have improperly gone beyond the scope of the direct examination. To the extent that *Agnello* must be read to prohibit the use of tainted evidence for impeachment when the cross-examination is proper, we submit that it should be overruled.

II. THE EVIDENCE SUPPRESSED IN THIS CASE WAS ADMISSIBLE TO IMPEACH RESPONDENT'S DIRECT TESTIMONY

We have argued in Part I, *supra*, that the court of appeals was incorrect in its holding that illegally seized evidence is admissible to impeach false testimony only if that testimony occurs on direct examination. Instead, we have contended the evidence was admissible here to impeach respondent's testimony, which was patently false and contradicted by the evidence, given in response to proper cross-examination questions. Even assuming that this Court adopts the distinction drawn by the court of appeals between testimony on direct examination and cross-examination, however, we submit that the evidence in this case was admissible because it in fact sufficiently contradicted respondent's direct testimony.

fruit of the illegal seizure. See 269 U.S. at 35; note 7, *supra*.

We would submit, however, that even in the situation where the cross-examination is a fruit, the policy of ascertaining the truth would outweigh the minimal additional deterrence to be gained by excluding such questions. Excluding evidence from use in the case in chief, and thus in many cases preventing a case from going to trial, is a sufficient deterrent to unlawful police conduct.

The test applied by the court of appeals is that "the evidence in question must contradict a particular statement made by the defendant" on direct examination (Pet. App. 7a). Because respondent did not testify specifically about the incriminating T-shirt on direct examination, the court of appeals held that the case was controlled by *Agnello* and that the evidence could not be introduced for impeachment.[16] In applying this test, however, the court of appeals allowed respondent, by virtue of his careful choice of words, to suggest to the jury that he had no involvement with the T-shirt, while at the same time insulating himself from impeachment. Indeed, respondent's testimony illustrates how easy it will be in many cases for defendants to tailor their direct testimony to avoid specific mention of the suppressed evidence, and thereby impeachment, while effectively denying the inferences to be drawn from the evidence.

McLeroth testified that he smuggled cocaine into the United States, after his and respondent's first trip to Peru, in bags strapped to his body by an elastic bandage that was wrapped around him and taped at the ends. Respondent assisted in securing the bags to McLeroth's body (A. 18). McLeroth also testified that the cocaine smuggled in on the fourth

[16] The court also relied on the fact that respondent was not "asked about the contents of his luggage" (Pet. App. 9a). This is not strictly true; respondent was asked on direct examination whether he had any cocaine in his luggage (A. 34). His denial that he had any cocaine, however, was truthful and provides no grounds for introduction of the suppressed evidence for impeachment.

trip, which resulted in respondent's arrest, was secreted in the altered T-shirt with pockets and that respondent aided in hiding the cocaine in the T-shirt (A. 27-28) and also originally supplied McLeroth with a pocketed T-shirt (A. 21). On his direct examination, respondent testified as follows (A. 34):

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.

Although respondent did not specifically deny participation in the preparation of the T-shirt for smuggling, his denial that he engaged in "that kind of activity" on the fourth visit to Peru could only have been taken by the jury to be a denial of his participation in the concealment of the cocaine. Considered in the abstract, the phrase "that kind of activity" is a vague one: it could be interpreted broadly to refer to the process of concealing material before smuggling it, in which case the suppressed evidence would contradict respondent's testimony; or it could, theoretically at least, refer only to "tap[ing] or drap[ing]" material around McLeroth's body, in which case the evidence would not necessarily be in conflict with respondent's testimony, because the preparation

of the T-shirt arguably did not entail "draping" material around McLeroth's body. Therefore, it cannot be said that respondent's direct testimony was unambiguously contradicted by the suppressed evidence.

Viewed in context, however, there can be no doubt that the thrust of respondent's direct testimony was to give the jury the false impression that he did not engage in concealing the cocaine for the smuggling attempt. Indeed, testifying only to the narrow point of whether respondent engaged in "taping or draping" on the fourth trip would have served no purpose, because neither McLeroth nor the government ever contended that the method of taping bags to the body was used on the fourth trip. Consequently, respondent's counsel deliberately did not ask him whether he was involved in taping on the fourth trip, but rather whether he was engaged in "that kind of activity." The jury could only take this to mean the concealment activity that the government actually contended was engaged in on the fourth trip. Respondent's general denial therefore had the same impact on the jury as if he had explicitly denied involvement with the T-shirt, but it was carefully tailored to avoid reference to the T-shirt.[17]

Despite the damaging false impression given by respondent's testimony, the court of appeals refused

[17] It is clear that respondent was consciously avoiding reference to the T-shirt. When asked on cross-examination whether he had denied involvement in "the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth," respondent replied: "I don't—I said I had nothing to do with any wrapping or bandages or anything, yes" (A. 35).

to permit impeachment on the ground that no "particular statement made by the defendant" was contradicted (Pet. App. 7a, 9a).[18] Application of this standard would result in a situation where the threat of impeachment would have little effect in inhibiting a defendant from testifying falsely on direct examination; rather, it would usually preclude exposure to the jury of the falsity of the direct testimony. By giving careful consideration to the phrasing of their testimony, "defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle* v. *Ohio*, *supra*, 426 U.S. at 617 n.7.

Cases decided by other courts of appeals disapproving impeachment of false testimony given on cross-examination have not involved such extensive direct testimony,[19] and it is questionable whether those

[18] The court went on to imply that it might be necessary to testify specifically about the suppressed evidence in order to meet this standard of contradiction (Pet. App. 7a, 9a), a position that respondent apparently takes (see Br. in Opp. 4, 6). This approach is so narrow as to almost eliminate the possibility of impeachment in any case, as illustrated by the defendant's argument in *United States* v. *Tweed*, 503 F.2d 1127, 1130 (7th Cir. 1974), that evidence that certain chemicals found in dynamite were detected on his clothes could not be admitted for impeachment because he did not testify about those chemicals on direct, only about whether he possessed dynamite.

[19] In *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979), the suppressed evidence was a statement by the defendant that he was known as "Booboo." At the close of the government's case, the trial court issued an advance ruling that if the defendant took the stand he could be asked on

courts would have excluded the impeachment evidence offered in this case. In *United States* v. *Whitson*, 587 F.2d 948 (9th Cir. 1978), the defendant was indicted for possession of an unregistered destructive device and for destruction of a vehicle used in interstate commerce after his van was blown up. The suppressed evidence was a statement by the defendant that he had been "in ordnance" in the Army. On his direct examination he denied having destroyed the vehicle or having possessed a bomb for that purpose. On cross-examination the government asked him whether he had told the officer that he was in the ordnance branch of the army. Following the defendant's negative response to these questions, the government introduced the suppressed evidence. While the defendant's knowledge of explosives was an area that could legitimately be explored on cross-examination (587 F.2d at 951), he had not adverted to any lack of knowledge on direct examination. Accordingly, the court reversed, concluding that the weight of authority was that tainted evidence could not be used to impeach "on a matter not opened by the defendant" (587 F.2d at 952).

In *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976), the defendant, charged with bank robbery, denied on direct examination that he had planned or

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cross-examination about nicknames, and that if he denied having been known as "Booboo," the government could introduce his prior statement for impeachment purposes. The defendant then declined to take the stand, and the court of appeals reversed the conviction. In view of the advance ruling posture of the case, the First Circuit had no occasion to consider the actual scope of the defendant's direct testimony.

discussed the robbery with his co-defendant and also stated that he would not rob a bank. Some bullets had been found in a search of the defendant's car that was assumed to be unlawful. After eliciting a denial from the defendant on cross-examination that the bullets were found in the car, the prosecution introduced the bullets for impeachment purposes. Focusing on the scope of defendant's direct examination, the court of appeals reversed on the ground that "the connection between Mariani's statement that he wouldn't rob a bank and the fact that bullets were found in his car is far too tenuous." 539 F.2d at 924. Finally, in *United States* v. *Trejo*, 501 F.2d 138 (9th Cir. 1974), the defendant on direct examination denied any participation in the armed bank robbery with which he was charged, and he offered an alibi. On cross-examination, he denied that he had ever owned a pistol, and the prosecution introduced for impeachment a pistol found in his home during an illegal search. The court affirmed the conviction but noted in dictum that it was error to permit the gun to be introduced "since the offered evidence does not focus on the truthfulness of a defendant's direct testimony." 501 F.2d at 145. Thus, the court of appeals' reliance in this case on *Mariani* and *Trejo* to support its requirement that a particular statement of the defendant be contradicted before illegally seized evidence is admissible for impeachment seems misplaced. That requirement is far more restrictive than anything suggested by those decisions.

Certainly, nothing in *Agnello* or *Walder* supports the narrow view taken by the court of appeals of the scope of impeachable testimony. In *Agnello*, the de-

fendant's direct testimony neither stated nor implied anything that was inconsistent with the suppressed evidence. In *Walder*, the suppressed heroin capsule was admitted even though it was not mentioned in the defendant's direct testimony. Surely, the prohibition in *Walder* against "letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility" (347 U.S. at 65) was not meant to be limited solely to cases where the suppressed evidence squarely contradicts a particular statement made on the defendant's direct testimony. This prohibition will be of no practical significance if respondent's carefully tailored direct testimony in this case is held to be insulated from impeachment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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